

DEC 07 2005

NEBRASKA DEPARTMENT
OF INSURANCE

CAUSE NO. A-1644

JURISDICTION

- ## STIPULATIONS OF FACT

1. The Department initiated this administrative proceeding by filing a petition styled State of Nebraska Department of Insurance vs. Carl L. Clark on November 2, 2005. A copy of the petition was served upon the Respondent at the Respondent's address registered with the Department by certified mail, return receipt requested.

2. The petition alleges that Respondent violated Neb. Rev. Stat. §44-1525(1)(d), §44-1525(1)(f), §44-1525(5)(a), §44-4059(1)(b), §44-4059(1)(g) and 44-4059(1)(h) as follows:

- a. Respondent was the appointed insurance agent with Conseco Health Insurance Company ("Conseco Health") for both Wilma Shultz and her husband Francis from at least June, 2002 when their Conseco Health cancer insurance policy 302708423 was rewritten from their previous Capital American cancer insurance policy. His appointment to represent Conseco Health was cancelled (terminated) on or about November 1, 2002.
- b. On November 3, 2004, Respondent stopped at the Shultz's home without an appointment or any prior notice, and proceeded to inform them that Conseco Health was bankrupt so their cancer policy with Conseco Health was no good, and that the Shultzs would have to buy an at-home care policy through Bankers Life and Casualty ("BL&C") if they were to get any money back from the Conseco Health cancer policy. Respondent further told the Shultzs that he would get the Conseco Health cancer policy cancelled, get the money back from that Conseco cancer policy, and bring it to them. Based upon Respondent's representation that Conseco Health was bankrupt and that if they were to get any money back from the Conseco Health cancer policy they would need to purchase an at-home care insurance policy through him from BL&C, the Shultzs followed his advice and decided to purchase an at-home care policy from BL&C due to their fear that they would be unable to get any money back on their Conseco Health cancer policy without such BL&C at-home care coverage. Thereafter, the Respondent completed an at-home care application on the Shultzs, signed it as the licensed agent, and submitted it with the premium to BL&C. The BL&C at-home care policy was subsequently issued effective November 3, 2004, and delivered to the Shultzs by Respondent on January 13, 2005. (Sometime after they purchased the BL&C at-home care policy, the Shultzs spoke with a Conseco Health agent about their cancer insurance policy and why they had decided to drop the cancer insurance policy with them. They explained to him that Respondent had told them that Conseco Health was bankrupt and their cancer policy would no longer be any good, so Respondent was getting the cancer policy cancelled so they could get their money back on that policy. The Conseco Health agent told them that Conseco Health was not bankrupt nor would it be going bankrupt. Further, he checked with Conseco Health and found that the Shultzs' cancer policy 302708423 was still in force.)
- c. On or about March 18, 2005, the Nebraska Department of Insurance received a complaint from the Shultzs that contained a number of allegations of misconduct by Respondent, including the allegations noted in subparagraph 2 b. above that Respondent had informed them that Conseco Health was bankrupt so their cancer policy with them was no good, and if they were to get any money

from that policy, they had to buy an at-home care policy through BL&C; and further that he would get the Conseco Health cancer policy cancelled, get the money back from that Conseco cancer policy, and bring it to them.

- d. On or about March 23, 2005, Barbara Ems ("Ems"), an insurance investigator for the Consumer Affairs Division of the Nebraska Department of Insurance, wrote to BL&C requesting its evaluation of the Shultzs' various allegations, which included the circumstances surrounding solicitation and sale of the at-home care policy to them by Respondent. Additionally, Ms. Ems wrote to Respondent requesting his response to the Shultzs' various allegations of misconduct, including the circumstances surrounding his solicitation and sale of the at-home care policy to them.
- e. On or about May 6, 2005, BL&C submitted its response to the Nebraska Department of Insurance that noted "in view of any misunderstanding" BL&C had voided the at-home care policy and refunded the \$1,926 premium. BL&C had also requested a statement from Respondent regarding the Shultzs' allegations, including the misconduct alleged as noted in subparagraphs 2 b & c. above. In his statement, Respondent said he contacted the Shultzs and went over the "at-home" policy with them. He claimed the Shultzs asked him about Conseco's bankruptcy, and that he told them Conseco Financial had filed in 2003 and he wasn't sure what was currently happening but he heard it had gone through and he believed they were doing ok. Further he said he showed them the Medicare Guide about the need for long term care insurance, and subsequently wrote them the BL&C "at-home" policy. He denied ever telling them that he was going to cancel the cancer insurance policy or bring them any money from it.
- f. On or about May 9, 2005, Ms. Ems of the Nebraska Department of Insurance sent a letter to the Shultzs and enclosed a copy of the statement of Respondent to their complaint. In reviewing Respondent's statement, the Shultzs dispute many of the things he says in that statement. For example, he claims that they asked him about Conseco's bankruptcy. They say this is not true; that he was the one who came to see them without an appointment in order to tell them that the insurer of their cancer policy, Conseco Health, was bankrupt so their cancer policy with them was no good, and that they would have to buy an at-home care policy through BL&C if they were to get any money back from the Conseco Health cancer policy. Additionally, they say Respondent just told them that Medicare would not cover at-home care; he never showed them any Medicare Buyers Guide.

3. The petition further alleges that Respondent violated Neb. Rev. Stat. §44-4050, §44-4059(1)(b), §44-4059(1)(e), §44-4059(1)(h) and §44-4060 (2) as follows:

- a. After Respondent had completed securing the necessary paperwork for the Shultzs to purchase the BL&C at-home care policy, Francis Shultz inquired of Respondent whether BL&C had any financial insurance products that would get them a better interest rate return on their money than they were currently getting on their bank Certificate of Deposit ("CD"). Respondent said that BL&C did have such products, and mentioned annuities, specifically single premium. When the Shultzs mentioned their understanding that the money put into an annuity had to remain there for ten years to avoid any withdrawal penalty, Respondent agreed that buying a ten year annuity at their ages (83 & 76) would be foolish, but the annuity he could sell them would not be for ten years and they could take their money out of the annuity at any time without incurring any withdrawal penalty.
- b. On January 14, 2005, Respondent again came to the Shultz's home. Since their bank CD was maturing, and relying on the representations of Respondent that the BL&C annuity he would sell them would not be for ten years and that they could withdraw the money from it at any time without any penalty, the Shultzs decided to purchase an annuity from BL&C through Respondent. The Shultzs provided Respondent the information he said he would need to complete the application, signed the annuity application and accompanying documents, and gave him the annuity premium check for \$56,000 because he said it would take too long for their bank to cash the CD and send the funds to BL&C. Respondent was alone both when he discussed the BL&C annuity with the Shultzs, and when he had them sign the annuity application and accompanying forms and took their \$56,000 premium check for the BL&C annuity policy.
- c. The BL&C annuity policy was subsequently issued and delivered to the Shultzs by Respondent on February 2, 2005. When Wilma Shultz later had an opportunity to read the BL&C annuity policy, she realized that it was a ten-year deferred annuity with certain withdrawal or surrender penalties that would apply if the money was withdrawn, or the annuity policy surrendered before the ten year period had been completed.
- d. At all times material hereto, Respondent was solely licensed to sell, solicit or negotiate sickness, accident and health insurance in the State of Nebraska. He was never licensed to sell, solicit or negotiate life insurance or annuities.
- e. On or about March 18, 2005, the Nebraska Department of Insurance received a complaint from the Shultzs that contained a number of allegations of misconduct by Respondent, including an allegation that Respondent had "required" the Shultzs to cash a CD to purchase an annuity through him with BL&C.

- f. On or about March 23, 2005, Barbara Ems ("Ems"), an insurance investigator for the Consumer Affairs Division of the Nebraska Department of Insurance, wrote to BL&C requesting its evaluation of the Shultzs' various allegations, which included the solicitation and sale of the annuity to them by Respondent. Additionally, Ms. Ems wrote to Respondent requesting his response to the Shultzs' various allegations of misconduct, including the solicitation and sale of the annuity to them.
- g. On or about May 6, 2005, BL&C submitted its response to the Nebraska Department of Insurance that noted "in view of any misunderstanding" BL&C had voided the annuity policy and refunded the \$56,000 premium. BL&C had also requested a statement from Respondent to reply to the Shultzs' allegations, including the alleged misconduct in the solicitation and sale of the annuity to them. In his statement, Respondent said that in response to the Shultzs' inquiry about BL&C's products, he told the Shultzs about them. They had a CD that was maturing, and Respondent called a fellow BL&C agent, Joanna Janousek-Green ("Janousek-Green") on January 11, 2005 about the Shultzs' interest in a BL&C annuity. Respondent further claimed that both he and Janousek-Green went to see the Shultzs on January 14, 2005 and Janousek-Green wrote their application for the BL&C annuity. After the annuity was issued, Respondent delivered the annuity to the Shultzs on February 2, 2005.
- h. On or about May 9, 2005, Ms. Ems of the Nebraska Department of Insurance sent a letter to the Shultzs and enclosed a copy of the statement of Respondent to their complaint. In reviewing Respondent's statement, the Shultzs dispute what he says in that letter about the solicitation and sale of the annuity to them. For example, he claims that he and another BL&C agent, Joanna Janousek-Green, met with them on January 14, 2005 and that Agent Janousek-Green wrote the application for the BL&C annuity. They say this is not true. There was no other BL&C agent present on January 14, 2005 when Agent Clark collected the information from them that he needed to complete the annuity application, had them sign the annuity application forms and provide him with the \$56,000 annuity policy premium check payable to BL&C. Further, they say that Respondent was always alone when he discussed the BL&C annuity with them.
- i. Due to her apparent role in the sale of the annuity to the Shultz, BL&C also requested a statement from Janousek-Green about her involvement in that annuity insurance transaction. In her statement to BL&C, Janousek-Green said that Respondent called her on January 11, 2005 regarding the Shultzs' interest in obtaining an annuity policy as they had a CD that was due to mature and the annuity's 5.5% interest was an attractive alternative. She confirmed Respondent's statement that she (along with Respondent) went to the Shultzs to write the annuity on January 14, 2005. She said she completed the Shultzs' annuity application and collected their premium check. However, on or about

May 9, 2005, BL&C spoke with Ms. Ems by phone to advise that Janousek-Green had *retracted* her initial statement that is paraphrased above in this subparagraph. In her *retraction*, Janousek-Green advised she was not present when Respondent had the Shultzs sign the annuity application. She said Respondent had talked with her previously about their interest in the annuity, and she had inquired of him when she could call upon them. Respondent told her the Shultzs had no questions and wanted to do the annuity so he had the annuity application signed and mailed to Janousek-Green to complete.

- j. On or about July 11, 2005, Ms. Ems wrote to Janousek-Green requesting complete details on the solicitation, completion, and submission of the Shultzs' annuity application, as well as whether Janousek-Green had shared the commission earned on the annuity policy sale with Respondent.
- k. On or about July 18, 2005, Janousek-Green submitted her written response to Ms. Ems. In her reply, she confirmed what she had previously advised BL&C in her retraction noted in subparagraph 3 (i) above. She further confirmed that she was not present when the annuity application and accompanying documents were signed. The annuity application and accompanying documents, along with the Shultzs' \$56,000 premium check and a copy of the receipt completed by Respondent were mailed to Janousek-Green and received on January 18, 2005 along with information Respondent had obtained from the Shultzs that Janousek-Green would need to complete the information required on the annuity application which she would then sign as the licensed resident agent. She submitted the completed annuity application, along with the Shultzs' premium check to her branch office that same day, and it was then sent on to the BL&C home office. Janousek-Green noted that the reason she signed the annuity application as the licensed resident agent was because Respondent was not licensed in the State of Nebraska to sell, solicit, or negotiate life insurance or annuities, and so BL&C would not be able to process and issue an annuity policy he had solicited and sold. BL&C did issue the annuity policy applied for by the Shultzs, and it was sent to Janousek-Green for delivery. She sent the annuity policy to Respondent to deliver to the Shultzs. Janousek-Green was paid a sales commission of \$1,960 for the Shultzs' annuity by BL&C, and pursuant to her agreement with Respondent she paid him \$900 as a nearly 50/50% split of that commission. She paid Respondent this commission split by check on February 8, 2005 and he cashed the check shortly thereafter. She admitted that this commission split with an agent not licensed to sell annuities in Nebraska was wrong, as was her agreeing with Respondent to submit as the licensed agent the Shultzs' annuity application as though she had solicited it, asked the questions of the applicants and recorded their answers, and obtained the premium for their policy when she had not done so. She also admitted she lied in her original statement to BL&C as she was afraid of admitting the truth and Respondent had assured her that if they "kept to their original story" nothing would happen. However, she decided she had to *retract* that statement and admit

to the true facts surrounding the solicitation and sale of the BL&C annuity policy # 7806866 to the Shultzs.

4. Respondent was informed of his right to a public hearing. Respondent waives that right, and enters into this Consent Order freely and voluntarily. Respondent understands and acknowledges that by waiving his right to a public hearing, Respondent also waives his right to confrontation of witnesses, production of evidence, and judicial review.

5. Respondent admits the allegations contained in the Petition and restated in Paragraphs #2 and 3 above.

CONCLUSIONS OF LAW

Respondent's conduct as alleged above constitutes a violation of Neb. Rev. Stat. §§44-1525(1)(d), 44-1525(1)(f), 44-1525(5)(a), 44-4050, 44-4059(1)(b), 44-4059(1)(e), 44-4059(1)(g), 44-4059(1)(h), and 44-4060(2).

CONSENT ORDER

It is therefore ordered by the Director of Insurance and agreed to by Respondent Carl L. Clark that Respondent shall pay an administrative fine of \$2,500 and shall have his license suspended for 10 days effective upon the date of approval of this Consent Order by the Director of the Department of Insurance. The fine must be paid in total within six (6) months from the date the Director of the Department of Insurance affixes his signature to this document and approves said consent agreement. If Respondent fails to pay this fine in the time specified, his Nebraska insurance producer's license shall automatically be suspended indefinitely until his fine is paid in total. The Nebraska Department of Insurance shall retain jurisdiction of this matter for the purpose of enabling the Respondent or the Department to make application for such further orders as may be necessary.

In witness of their intention to be bound by this Consent Order, each party has executed this document by subscribing his signature below.

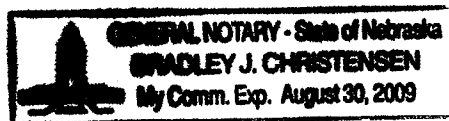
Michael C. Boyd
Michael C. Boyd
Attorney for Nebraska
Department of Insurance
941 "O" Street, Suite 400
Lincoln, Nebraska 68508
(402)471-2201

12-6-05
Date

Carl Clark
Respondent
12-2-05
Date

State of Nebraska)
County of Sherman) ss.

On this 2nd day of December, 2005, Carl L. Clark personally appeared before me and read this Consent Order, executed the same and acknowledged the same to be his voluntary act and deed.



Bradley J. Christensen
Notary Public

I hereby certify that the foregoing Consent Order is adopted as the Final Order of the Nebraska Department of Insurance in the matter of State of Nebraska Department of Insurance vs. Carl L. Clark, Cause No. A-1644.

STATE OF NEBRASKA
DEPARTMENT OF INSURANCE
L. Tim Wagner
L. TIM WAGNER
Director of Insurance
12/2/05
Date

CERTIFICATE OF SERVICE

I hereby certify that a copy of the executed Consent Order was sent to the Respondent at Rt.
2 Box 190C, Loup City, Nebraska 68853, by certified mail, return receipt requested on this 9th
day of December 2005.

Tracy A. Zuhn

NOTED & RECORDED
CLERK OF DISTRICT COURT

2005 DEC 9

11:47 AM